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Supreme Court, U.S.
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~~No. 01-1800~~

In The
SUPREME COURT OF THE UNITED STATES

KIA P., INDIVIDUALLY AND ON BEHALF OF MORA P.,
Petitioners,

v.

CITY OF NEW YORK, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. RESPONDENTS' BRIEFS IN OPPOSITION FAIL TO COUNTER THE FACT THAT THE SECOND CIRCUIT'S RULINGS ON STATE ACTION ARE CONTRARY TO THE *BRENTWOOD ACADEMY* ENTWINEMENT TEST, AND IGNORE IMPORTANT FACTS IN THIS CASE

A. Under *Brentwood Academy*, A Private Body That Performs A Public Function Delegated by the State is Acting "Under Color of State Law" Even if The Private Entity is Also Performing A Non-State Function the Same Time

Respondents give no adequate response, in their brief in opposition, to the fact that the Second Circuit ruled contrary to the law, as explained in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001). The Second Circuit correctly observed that:

> There is evidence from which a jury could conclude that in addition to the Hospital's medical decision not to issue a release until April 6 or 7 pursuant to its medical relationship with Mora, it also put a hold on her release in its social welfare role because of its concern about her care in the hands of her mother. As the district court correctly found, insofar as the Hospital was acting in the latter capacity – as part of the reporting and enforcement machinery for CWA, a government agency charged with detection and prevention of child abuse and neglect – the Hospital was a state actor.

Kia P. v. McIntyre, 235 F.3d 749, at 755 (2nd Cir. 2000).

The Second Circuit then went astray when it concluded, contrary to *Brentwood Academy*, that the "state action" aspect of the Hospital's hold on Mora was somehow nullified for the first eight or nine days of Mora's detention because the Hospital was concurrently providing private medical services. 235 F.3d at 757. This Court has never ruled that a person is either always a state actor or never a state actor. On the contrary, in determining state action, this Court focuses not on the actor, but on the "challenged action" itself. *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, ___, 121 S.Ct. at 930 (2001), quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974). Thus, even a public employee acts under color of state law only "while acting in his official capacity or while exercising his responsibilities pursuant to state law," *West v. Atkins*, 487 U.S. 42, 50 (1982), *i.e.*, not when he is off duty. Likewise, a physician in private practice, who is hired by the government to provide medical treatment for prisoners, acts under color of state law while treating the prisoners, even though he acts in his private capacity while treating his private patients. *West v. Atkins*, 487 U.S. 42, 54 (1982).

The Second Circuit's ruling, moreover, conflicts with the ruling of the Ninth Circuit in *Jensen v. Lane County*, 222 F.3d 570 (9th Cir. 2000). In *Jensen*, the Ninth Circuit held that hospital staff acted under color of state law in making the determination to detain individuals "who are believed to be mentally ill." 222 F.3d at 575.

B. The Evidence Shows That the "Hold" on Mora P. Was Not Solely a Medical Hold, But Was At Least Partly Due to CWA Directive, For the Entire Eleven Days

Hospital respondents insist that the Second Circuit correctly affirmed the grant of summary judgment in favor of the respondents, and that there was no due process deprivation. To support that contention, the respondents repeatedly rely on the Second Circuits' conclusion that the first eight or nine days of the "hold" on Mora P. was solely (or primarily) a "medical hold" and that only one or two days of the hospital's refusal to release the infant to her mother were purely due to CWA directive. The facts of this case prove that conclusion incorrect.

First, if the hold were purely a "medical hold" for the first eight or nine days, then the hospital would have been required to release Mora P. in response to Kia P.'s repeated demands for custody of her daughter. New York law does not permit hospitals to detain patients who are allegedly suffering from physiological, as opposed to psychological, health conditions. *White v. Albany Medical Center Hospital*, 151 A.D.2d 859, 592 N.Y.S.2d 83 (3rd Dept. 1989). Moreover, under New York law, patients who refuse medical treatment cannot be treated, even if doctors think that the treatment is necessary to save the lives of the patients. *Fosmire v. Nicoleau*, 75 N.Y.2d 218, 551 N.Y.S.2d 876, 551 N.E.2d 77 (1996).

Second, both opinions below recognized that the Hospital had non-medical reasons for detaining Mora P. over Kia P.'s objections. As the Second Circuit recognized, "[s]ome evidence suggests that if the Hospital does not have concerns relating to the ability of a parent properly to care for an infant, there may be circumstances when, at least absent further action

by the Hospital, that parent may take the child home despite 'medical advice' to the contrary." *Kia P. v. McIntyre*, 235 F.3d at 756, n.2. In the summary judgment context "some evidence" is enough for Kia P. to overcome a motion by the hospital. *See Celotex Corp. v. Cattrett*, 477 U.S. 317, 322-323 (1986). Likewise, the District Court found that "the Hospital did more than simply treat Mora." App. at D10. Because the hospital failed to release Mora P. in response to Kia P.'s demands, it must have been operating according to some other directive and holding Mora P. under some other authority than a "medical hold."

Third, if the hold were purely a "medical hold" for the first eight or nine days, then the hospital should have released Mora P. to her mother the moment the medical hold was lifted by the doctors, on April 6, 1993. By continuing to hold Mora P. at that point, until it received clearance from CWA, the Hospital demonstrated that it had seized custody earlier pursuant to CWA directive, and would not relinquish that custody until CWA released the hold. Notably, the hospital did not "re-seize" Mora P. on April 6 pursuant to a new CWA instruction after Mora P.'s doctors cleared her for medical release – the hospital merely *continued* to hold Mora P. pending contrary instruction from CWA.

Fourth, if the hold was purely a "medical hold" for the first eight or nine days, then the hospital social worker, Susan Morance, would not have told Kia P. that her newborn baby had been placed under "social hold" as soon as the positive methadone test had been reported to the State Central Register, according to state law and hospital policy. New York Soc. Serv. Law §§ 413, 417; Long Island College Hospital Administrative Procedures and Information Manual SO-100 *See* Ex. G to the Petition for Writ of Certiorari. Morance told Kia P., "I have to talk to... CWA" and "Your daughter has a

social hold on her. You will not be able to take her home. This is a case of CWA." *Kia P. v. McIntyre*, 235 F.3d at 752.

Finally, even Municipal Respondents agree that Hospital Respondents held Mora for non-medical reasons. As Municipal Respondents note, a hospital physician stated that Mora was detained pursuant to a "social hold." Municipals Respondents' Brief, at 8. Indeed, Mora's hospital chart contains repeated notations that the infant was on a "social hold," *Id.* at 9, entries which Hospital Respondents have attempted to disavow.

The evidence clearly shows that the hospital's hold on Mora P. was never purely a "medical hold" but was due to joint City and Hospital policy for the entire eleven days the baby girl was kept from her mother's custody. Even if that issue is in doubt as an evidentiary matter, that factual question must be assumed to be resolved in favor of the petitioners, since respondents moved for summary judgment. As Kia P.'s Petition for Writ of Certiorari amply argues, an eleven-day seizure into protective custody without any hearing before or after seizure certainly constitutes a due process violation.

II. The State Action and Due Process Issues in the Child Welfare Context in This Case Are of National Importance, as the Vast Majority of States Require Hospitals by Law to Comply with Child Protective Agency Directives in Handling Cases of Suspected Child Abuse

The instant case arises in significant part as a result of New York State law that mandates that hospital officials both report cases of suspected child abuse to the New York government, and, in some circumstances, seize custody of children who are suspected to be victims of child abuse. New York Soc. Serv. Law §§ 413 & 417. As the Second Circuit observed, under

these circumstances, private hospitals are acting as the "reporting and enforcement machinery for CWA." 235 F.3d at 756.

New York is certainly not alone in its mandatory enlistment of private hospitals and hospital staff in doing the work of the state child welfare agency. Forty-seven states and the District of Columbia include doctors or other hospital officials among those who are required by law to report suspected abuse to their appropriate state agency.[1] Several states, like New York,

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1. Alabama, Code of Ala. Sec. 26-14-3(a) (2001); Alaska, Alaska Stat. Sec. 47.17.020(a)(1) (2001); Arizona, A.R.S. sec. 13-3620(A) (2000); California, Cal. Pen. Code sec. 11165.7(a)(21) (2001); Colorado, C.R.S. 19-3-304(2)(a) (2000); Connecticut, Ct. Code sec. 17a – 101 (b); Delaware, 16 Del. C. Sec. 903 (2000); District of Columbia, D.C. Code sec. 2-1352(b); Florida, Fla. Stat. Sec. 39.201(1)(a) (2000); Georgia, O.C. G. A. Sec. 19-7-5(c)(1)(A); Hawaii, HRS sec. 350-1.1(a)(1) (2000); Idaho, Idaho Code sec. 16-1619(a) (2000); Illinois, 325 ILCS 5/4 (2001); Indiana; Ind. Code sec. 31-33-5-1 (2000) (any individual); Iowa, Iowa Code sec. 232.69 (1)(a) (2001); Kansas, K.S.A. 38-1522 sec. 2(a) (2001); Kentucky, KRS sec. 620.030 (2) (2001); Louisiana, La. Ch.C. Art. 603(13) (2000); Maine, 22MRSA sec. 3477(1)(A) (2001); Maryland, Md. Code sec. 5-704(a) (1987); Michigan, MCL sec. 722.623 (1) (2001); Minnesota, Minn. Stat. Sec. 626.556 subd. 3(a)(1)(2000); Missouri, sec. 210.115(1) R.S.Mo. (2000); Montana, sec. 41-3-201(2)(a), MCA (2001); Mississippi, Miss. Code Ann. Sec. 43-21-353(1) (2001); Nevada, Nev. Rev. Stat. Sec. 432B.220(3)(a) (2001); Massachusetts, Mass. Ann. Laws ch. 119, sec. 51A (2001); New Hampshire, RSA 169-C:29 (2000); New Jersey, N.J. Stat. Sec. 9:6-8.10 (2001); New Mexico, N.M. Stat. Ann. Sec. 32A-4-3(A) (2000); New York, NY CLS Soc. Serv. Sec. 413 (1) (2001); North Carolina, N.C. Gen. Stat. Sec. 7B-301 (2001)(any person or institution); North Dakota, N.D. Cent. Code, sec. 43-17-41(1) (2000); Ohio, ORC Ann. 2151.421(A)(1)(b) (Anderson 2001); Oklahoma, 10 Okl. St. Sec. 7103(A)(1)(a) (2000); Oregon, ORS sec. 419B.010(1) (1999)(any

require hospitals to seize custody of children under certain circumstances. *See* Petition for Certiorari, p. 6 n.4.

With doctors and hospitals all over the country acting as the "reporting and enforcement machinery" of state child welfare agencies, the citizens and courts need clarification from this Court as to when these private officials and institutions will be held responsible, as arms of the state, for violating the constitutional rights of the people.

CONCLUSION

For the reasons stated above and in the Petition for Writ of Certiorari, Petitioners pray that their petition be granted and that this Honorable Court decide the issues raised therein, or in the alternative, that the Court vacate the judgment of the Second Circuit and remand the case to the District Court for further proceedings not inconsistent with the standards enunciated in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288.

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public or private official); Pennsylvania, 23 Pa. C.S. sec. 6311(B)(2000); Rhode Island, R.I. Gen. Law. Sec. 40-11-3(a)(2001) (any person); South Dakota, S.D. Codified Laws sec. 26-8A-3 (2001); Tennessee, Tenn. Code Ann. Sec. 37-1-403(a)(1) (2001); Texas, Tex. Fam. Code sec. 261.101(b) (2000); Utah, Utah Code Ann sec. 62A-4a-403 (1) (2001); Vermont, 33 V.S.A. sec. 4913(a) (2001); Virginia, Va. Code Ann. Sec. 63.1-248.3(A)(1) (2001); Washington, Rev. Code Wash. Sec. 26.44.030(1)(a) (2001); West Virginia, W.Va. Code sec. 49-6A-2 (2000); Wisconsin, Wis. Stat. Sec. 48.981(2) (2000); and Wyoming, Wyo. Stat. Sec. 14-3-205(a) (2001)(any person).

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